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Leapfrogging over Equal Protection Analysis: The Eighth Circuit Sanctions Separate and Unequal Prison Facilities for Males and Females in *Klinger v. Department of Corrections*, 31 F.3d 727 (8th Cir. 1994)

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Note

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I. INTRODUCTION

Women's prisons are experiencing considerable growth in the criminal justice system.[1] In 1980, more than 12,000 women were housed in federal and state prisons.[2] The numbers have steadily increased, totaling almost 60,000 women who are currently being held in federal

1. *See* Stephen J. Schulhofer, *The Feminist Challenge in Criminal Law*, 143 U. PA. L. REV. 2151, 2196 (1995).
2. *See* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, WOMEN IN PRISON 7 (1991). *See also* Schulhofer, *supra* note 1, at 2196.

and state prisons.[3] Since the early 1980s, the growth rate in the number of women prisoners has almost doubled that of male prisoners. The male prison population has grown by 214%, while the female prison population has grown by 386%.[4] The number of female inmates is still small, however, when compared to the number of male inmates.[5]

This difference in numbers has led to increased disparities in the treatment of male and female prisoners.[6] For example, male prisoners usually are placed in separate institutions according to their security risk, whereas it is impractical to provide maximum and minimum security risk prisons for the relatively small number of female inmates. Similarly, women's prisons are often unable to offer medical and counseling services that are as complete as those in larger men's prisons.[7] Many educational and vocational programs available to men are scaled down considerably or are not offered at all to women.[8]

Historically, women have been incarcerated with no particular mandate for what to do with them.[9] Although courts often give lip service to providing equal protection for women once they are confined to prisons, the equal treatment often ends when the women actually enter the prison system. Typically, the programs and vocational services offered to women prisoners are enacted to help women fulfill their traditional homemaking roles. Most women's prisons offer programs that reflect the outdated attitude prevalent in the 1960s. As such, programs like sewing, decals application, handicrafts, and cooking are the most common training programs available to women, whereas men's prisons offer a wide variety of vocational training.[10]

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3. *See* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PRISONERS IN 1994, at 8 (1995). *See also* Schulhofer, *supra* note 1, at 2196-97.
4. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PRISONERS IN 1994, at 8 (1995).
5. Women constitute only 6.1% of the total national prison population. In 1994, Nebraska had 157 female inmates, which comprised 6% of all inmates in Nebraska. *Id.* at 6.
6. *See* Barry Ruback, *The Sexually Integrated Prison*, *in* COED PRISON 33, 34 (John Ortiz Smykla ed., 1980).
7. *Id.* at 35.
8. *Id.*
9. *See* NICOLE H. RAFTER, PARTIAL JUSTICE: WOMEN, PRISONS, AND SOCIAL CONTROL xxxii (2d ed. 1990). *See also* Donna L. Laddy, *Can Women Prisoners Be Carpenters? A Proposed Analysis for Equal Protection Claims of Gender Discrimination in Education and Vocational Programming at Women's Prisons*, 5 TEMP. POL. & CIV. RTS. L. REV. 1, 17 (1995).
10. Schulhofer, *supra* note 1, at 2198. For example,

> Men's prisons in Michigan offer vocational training in twenty areas, but until recently, the women's prison offered only five programs—most focused on such skills as short-order cooking and handicrafts. In Idaho, the women's prison offers only two vocational programs, one of which

Although "inmates do not have a constitutional right to vocational or educational programs per se,"[11] disparities in access to these programs may violate the United States Constitution.[12] When classifications have been based on gender, courts have held that the classification must be analyzed under a heightened scrutiny standard.[13] The Eighth Circuit, in *Klinger v. Department of Corrections*,[14] however, frustrated any possibility for women inmates to ever establish an equal protection violation for inferior programs and services in the prison context.

This Note will discuss the Eighth Circuit's decision in *Klinger* and will argue that its conclusion rested on a fundamental misapplication of the standards enunciated by the United States Supreme Court for the analysis of gender-based equal protection claims under the Fourteenth Amendment. Part II will present the background of the *Klinger* decision specifically and the position of incarcerated women generally. Parts III and IV will discuss the scrutiny standard applicable to equal protection claims based on gender discrimination and will conclude that the Eighth Circuit was wrong to dismiss the plaintiffs' claims without applying the appropriate level of scrutiny. Part V will discuss the Eighth Circuit's imposition of a threshold standard, mandating that plaintiffs prove that they are similarly situated to male prisoners. Part VI will discuss the Eighth Circuit's alternate holding that even if women prisoners are similarly situated to male prisoners, the classification was not facially invalid and thus plaintiffs must prove intentional discrimination. Finally, Part VII will analyze the impact the Eighth Circuit's opinion has had on subsequent equal protection litigation.

> teaches the women how to make decals. In Louisiana, the only program for women is a sewing class. In Montana, the women's prison has job slots available to only 18% of the inmates, and only two programs are offered—sewing and data entry. The Nevada prison system offers male inmates vocational training in a wide variety of positions, but the women can choose only from domestic jobs.

Id. (footnotes omitted).

11. JOYCELYN M. POLLOCK-BYRNE, WOMEN, PRISON & CRIME 169 (1990).
12. *See* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439 (1985)(explaining that the defendants violated the Equal Protection Clause by requiring a special permit for a proposed group home for the mentally retarded as the requirement was not rationally related to any permissible government purpose).
13. *See* Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982)(explaining the Court's use of heightened scrutiny in gender-based classifications); Craig v. Boren, 429 U.S. 190, 197 (1976)(holding that an exceedingly persuasive justification must support a gender classification).
14. 31 F.3d 727 (8th Cir. 1994), *cert. denied*, 513 U.S. 1185 (1995).

II. BACKGROUND

The Nebraska Center for Women (NCW) is the only prison for women in the State of Nebraska. Because women are housed only in NCW based solely on their gender, female inmates consequently can receive only those educational programs and services offered at NCW.[15] Men, on the other hand, are incarcerated in a number of different prison facilities depending upon a variety of penological considerations, which range from an inmate's custody level to his programming needs.[16]

Male inmates in Nebraska can be housed in one of four penal institutions. The Nebraska State Penitentiary (NSP) normally houses the medium and maximum security inmates. The other three institutions generally house the minimum security inmates.[17] At the time of the lawsuit, the female population at NCW ranged from approximately ninety to 130 inmates and included inmates with minimum, medium, and maximum security designations. During the same period, the male population at NSP ranged from approximately 650 to 800 inmates.[18]

Nebraska assigns male and female prisoners to sex-segregated prisons that provide male and female prisoners access to a different constellation of services and programs. Many of the educational, vocational, and recreational programs and services available to female prisoners in Nebraska are manifestly inferior to those offered to male prisoners.[19] Allocating such programs reflects indifference, bias, and stereotypical notions of women's roles in society.[20]

The Eighth Circuit Court of Appeals came face to face with the issue of opportunities provided to women incarcerated in Nebraska. In *Klinger v. Department of Corrections*, a class action suit was filed by female inmates at NCW. These plaintiffs contended that they received inferior and unequal prison programs and services compared to those provided to the male inmates at NSP and, accordingly, the female inmates' rights guaranteed by the Fourteenth Amendment's Equal Protection Clause had been violated.[21] The women were con-

15. Klinger v. Nebraska Dep't of Correctional Servs., 824 F. Supp. 1374, 1388 (D. Neb. 1993), *rev'd*, 31 F.3d 727 (8th Cir. 1994).
16. *Id.* at 1382.
17. *Id.* at 1381.
18. *Id.*
19. *Id.* at 1396-431.
20. *Id.*
21. The Fourteenth Amendment provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. Essentially, the Equal Protection Clause denies the states the power to "legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute." Reed v. Reed, 404 U.S. 71, 75-76 (1971).

cerned specifically about inferior programs such as education and services that were offered at NCW.[22]

Believing they were treated unfairly, some of the women prepared a written grievance and circulated it among the other inmates at NCW. The NCW superintendent acknowledged receipt of the grievance, but refused to address the issues that the grievance raised because it required certain comparisons that the NCW staff refused to make. The superintendent suggested to the NCW inmates that they submit the grievance to the director of the Nebraska Department of Correctional Services (DCS).[23] As suggested, the inmates submitted the letter to the DCS. The DCS responded by denying that inequality existed for the NCW inmates, but did promise relief in three main areas: lack of equal pay, lack of visitation for inmates during their initial orientation at the prison, and lack of inmate training in legal research.[24] Relief was also granted in some minor respects, such as equalizing when the lights had to be turned off for the night in both the male and female facilities. Despite the DCS's promises, after four months equal pay had not been established and no inmate had completed training in legal research.[25] Consequently, the inmates filed a pro se complaint in the United States District Court of Nebraska on July 20, 1988.[26]

In nearly every area of prison programming, the district court found that the female inmates were burdened by comparatively inferior programs and services, which could not be justified by an important state interest. Equal protection violations were found in the following areas: postsecondary and vocational education; prison law libraries; medical, dental, and mental health care; inmate pay; preem-

22. Klinger v. Nebraska Dep't of Correctional Servs., 824 F. Supp. 1374, 1381 (D. Neb. 1993).

23. *Id.* at 1381-82.

24. *Id.* at 1382.

25. *Id.*

26. In addition to their equal protection claim, the plaintiffs also alleged that the inferior education and vocational training violated Title IX of the Education Amendments of 1972, and that the inadequate law library violated the plaintiffs' right of meaningful access to the courts. The plaintiffs initially prevailed on both claims. *See* Klinger v. Nebraska Dep't of Correctional Servs., 824 F. Supp. 1374, 1432-35 (D. Neb. 1993). The defendants then brought an interlocutory appeal. On remand from the Eighth Circuit, the district court, in 2 separate opinions, reversed itself on the Title IX claim, but affirmed its holding that the plaintiffs were denied meaningful access to the courts. *See* Klinger v. Nebraska Dep't of Correctional Servs., 887 F. Supp. 1281, 1286-87 (D. Neb. 1995); Klinger v. Nebraska Dep't of Correctional Servs., 902 F. Supp. 1036, 1040-41 (D. Neb. 1995). After the entry of final judgment, both the plaintiffs and defendants appealed. The Eighth Circuit concluded that the plaintiffs failed to establish either a violation of Title IX or meaningful access to the courts. *See* Klinger v. Department of Corrections, 107 F.3d 609, 614-18 (8th Cir. 1997). Further analysis of these issues is beyond the scope of this Note.

ployment training; prerelease programs; and recreational opportunities.[27] Without exception, the court concluded the disparate treatment in each area was predicated upon inaccurate, irrelevant, or pretextual stereotypical assumptions about women that served to devalue women inmates.[28]

Interlocutory appeal pursuant to 28 U.S.C. § 1292(b)[29] was granted. The issue on appeal was confined to consideration of the proper legal analysis to be applied to claims of gender discrimination in prisons under the Equal Protection Clause. The Eighth Circuit was asked to consider three issues, focusing exclusively upon the equal protection violations found by the district court:

> (1) Did the court correctly determine that the female inmates at the Nebraska Center for Women are similarly situated to the male inmates at the Nebraska State Penitentiary for purposes of the Equal Protection Clause regarding the programs and services challenged by the plaintiffs?
>
> (2) Did the court correctly determine that "heightened scrutiny" as opposed to "rational basis" scrutiny is the proper level of scrutiny to judge the equal protection claims of the female inmates at the Nebraska Center for Women, and if so, did the court correctly apply "heightened scrutiny" to the facts?
>
> (3) Did the court correctly conclude that the Equal Protection Clause requires the State of Nebraska to provide programs and services to female inmates at NCW which are "substantially equivalent" to or in parity with the programs and services provided male inmates at the Nebraska State Penitentiary and, if so, did the court correctly apply such concepts to the facts?[30]

The appellate court addressed only the first of these issues and, with one judge dissenting, concluded as a threshold matter that female inmates at NCW and male inmates at NSP were not "similarly situated" under the Equal Protection Clause for purposes of comparing prison programs and services. The majority of the Eighth Circuit panel held that the plaintiffs did not sustain a threshold burden, imposed by the panel, of demonstrating that they were similarly situated to male inmates for purposes of analyzing prison programs and services.[31] The court held that the first step in an equal protection case is "determining whether the plaintiff has demonstrated that she was treated differently than others who were similarly situated to her."[32] According

27. *See* Petition for Writ of Certiorari for Plaintiffs-Appellees at 4-5, Klinger v. Nebraska Dep't of Corrections, 513 U.S. 1185 (1995)(No. 94-7589).

28. *See id.* at 5.

29. Section 1292(b) contemplates that the court, having decided one or several issues that are closely related to the ultimate disposition of claims and defenses advanced by the parties, may deem it advisable to certify its decisions for interlocutory review to obtain a definite ruling that may materially advance dispositions of a party's claims. 28 U.S.C. § 1292(b) (1995). *See, e.g.*, United States v. American Soc'y of Composers, Authors & Publishers, 782 F. Supp. 778 (S.D.N.Y. 1991).

30. Klinger v. Department of Corrections, 31 F.3d 727, 730 (8th Cir. 1994).

31. *Id.* at 729.

32. *Id.* at 731.

to the majority, the inmates failed to demonstrate that they were similarly situated to the male inmates at NSP.

The court reasoned that the two penal institutions were not similar because different inmates were housed in each institution and each operated with limited resources to fulfill different specific needs.[33] Hence, the court reasoned that "comparing programs at NSP to those at NCW is like the proverbial comparison of apples to oranges."[34] The court also noted that "using an inter-prison program comparison to analyze equal protection claims improperly assumes that the Constitution requires all prisons to have similar program priorities and to allocate resources similarly."[35]

The court further reasoned that because courts have little expertise in the "inordinately difficult task of running prisons, courts should accord a high degree of deference to prison authorities."[36] As such, subjecting prison officials' decisions to close scrutiny "distorts the decisionmaking process" and "seriously hampers officials' ability to adopt innovative solutions to the intractable problems of prison administration."[37] In establishing this reduced burden, the majority foreclosed the application of heightened scrutiny to the important question of whether denying women prisoners the benefits and opportunities made available to male prisoners is constitutional.

The majority also held that the district court erroneously assumed the case involved a facial gender classification.[38] Further, the appeals panel concluded that the district court erred in shifting the burden to the defendants to justify differences in prison programming on sex-neutral grounds.[39] As such, in this alternate holding, the court held that the plaintiffs failed to satisfy their burden of establishing that the discrimination at issue was intentional. Under either theory, the inmates equal protection claims were consequently dismissed.[40]

III. STANDARD OF SCRUTINY APPLICABLE IN EQUAL PROTECTION CASES

Depending on the type of claim at issue, federal courts apply one of three analytical models to analyze whether state action violates the Equal Protection Clause of the United States Constitution: a rational basis standard, a heightened scrutiny standard, or a strict scrutiny standard. As early as 1819, the Supreme Court created the ground-

33. *Id.*
34. *Id.* at 733.
35. *Id.* at 732.
36. *Id.*
37. *Id.* (quoting Turner v. Safley, 482 U.S. 78, 89 (1987)).
38. *Id.* at 734.
39. *Id.*
40. *Id.*

work for the rational basis standard. Chief Justice Marshall explained the constitutional limits of congressional authority: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."[41] Under this rational basis standard, courts typically apply a dual analysis to review state action. The state's ends need only be legitimate, and the means chosen need only be rationally related to those ends.[42] The rational relationship portion of the standard is quite broad. Courts need only inquire whether the classification bears a rational relationship to the ends.[43]

The United States Supreme Court first acknowledged that a higher degree of analysis was required for gender classifications in the 1970s. This recognition coincided with an increase in political awareness of women's social, political, and economic position and with an increase in the number of gender-based laws passed into legislation. For a five year period, the Court struggled with the appropriate standard of review to be applied in gender-based discrimination.[44] It soon became clear that the Supreme Court would no longer treat sex-based classifications with the judicial deference given to economic regulations. It became equally clear, however, that the Court would not impose strict scrutiny for such classifications either.[45] Strict scrutiny is imposed when the group challenging the state action is classified as a "suspect class." A suspect classification is found where the regulations disparately burden groups historically subjected to discriminatory treatment.[46] Such groups are typically composed of either racial or ethnic minorities.

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41. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819).
42. *See* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 574-75 (4th ed. 1991). Nowak and Rotunda comment further that
> [i]n recent years the equal protection guarantee has become the single most important concept in the Constitution for the protection of individual rights. As we have seen, substantive due process analysis was disclaimed after 1937 and the justices today are not willing to restrict the legislative ability to deal with a subject under that analysis. And the privileges or immunities clause of the fourteenth amendment has never been a meaningful vehicle for the judicial review of state actions, although it may have been intended to be a primary safeguard of natural law rights by the drafters of the amendments.

Id. at 568 (footnotes omitted). *See also* Ann L. Iijima, *Minnesota Equal Protection in the Third Millennium: "Old Formulations" or "New Articulations"?*, 20 WM. MITCHELL L. REV. 337, 342 (1994).
43. *See, e.g.*, Lindsey v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911).
44. NOWAK & ROTUNDA, *supra* note 42, at 734.
45. *Id.*
46. United States v. Carolene Prods. Co., 304 U.S. 144, 153 n.4 (1938). In 1944, the United States Supreme Court, in *Korematsu v. United States*, 323 U.S. 214 (1944), determined that deference to governmental action would be inappropriate where disparate treatment was based on race or national origin. Instead, the

The Supreme Court finally delineated a higher standard for a classification based on gender in *Reed v. Reed*.[47] In *Reed*, the Court held that the intermediate classification must "rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."[48] Based on this articulation of the intermediate scrutiny standard, the Court invalidated an Idaho statute that appointed male rather than female administrators to intestate decedents' estates. The Court disagreed with the State's argument that reducing the workload on probate courts and avoiding intrafamily controversy were important enough justifications to sustain the legislation.[49] *Reed* laid the groundwork for future decisions.

In *Craig v. Boren*,[50] the Supreme Court held that the decision in *Reed* was controlling[51] and that "outdated misconceptions concerning the role of females in the home rather than in the marketplace and world of ideas" would not sustain the States' burden to prove the legitimacy of regulations or statutes.[52] As such, the Court began to recognize the need for a higher level of scrutiny when evaluating state action regarding certain classifications.

The Court in *Craig* invalidated an Oklahoma statute that prohibited the sale of beer to males under the age of twenty-one and females under the age of eighteen. The Court began its analysis by referring to the reminder in *Reed* that statutory classifications distinguishing between males and females are "subject to scrutiny under the Equal Protection Clause" and that the rational basis standard did not sufficiently protect the interests from invasions by the state.[53] Thus, applying heightened scrutiny as a standard for evaluating state action requires the challenged regulation to be "substantially related" to an "important governmental interest."[54] As in *Reed*, the *Craig* Court declared that outdated misconceptions concerning the role of females in the home were loose-fitting characterizations incapable of supporting the state schemes.[55] As a result, the Court held that Oklahoma's gender-based statute constituted a denial of equal protection to males

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Court held that such government action would be subject to "the most rigid scrutiny." *Id.* at 216. Under this standard, the action must be necessary to achieve a compelling governmental purpose.

47. 404 U.S. 71 (1971).
48. *Id.* at 76 (quoting Royster Guano Co. v. Virginia, 253 U.S. 412 (1920)).
49. *Id.*
50. 429 U.S. 190 (1976).
51. *Id.* at 199.
52. *Id.* at 198-99.
53. *Id.* at 197.
54. *Id.*
55. *Id.* at 198-99.

ages eighteen to twenty.[56] The Supreme Court has adhered to this standard ever since.[57]

The Court affirmed this standard of gender based classification twenty years later by requiring "*all* gender-based classifications" to be analyzed under "heightened scrutiny."[58] In *J.E.B. v. Alabama ex rel. T.B.*,[59] the Supreme Court held that gender-based peremptory challenges in jury selection did not survive the heightened equal protection scrutiny that the Court has routinely required. The Court explained that "[i]ntentional discrimination on the basis of gender by state actors violates the Equal Protection Clause, particularly where . . . the discrimination serves to ratify and perpetuate invidious, archaic, and overbroad stereotypes about the relative abilities of men and women."[60] The Court further noted that sex discrimination has had an unfortunate history, which warrants application of heightened scrutiny for all gender based classifications.[61]

The Supreme Court most recently affirmed these principles in *United States v. Virginia*,[62] noting that it has "carefully inspected official action that closes a door or denies opportunity to women."[63] As such, "'all gender-based classifications today' warrant 'heightened scrutiny.'"[64] To withstand this heightened scrutiny, a party seeking to uphold government action based on gender must offer an "exceedingly persuasive justification" for the classification.[65]

United States v. Virginia involved gender discrimination by the Virginia Military Institute (VMI), the sole single-sex school among Virginia's fifteen public institutions of higher learning.[66] Responding to the Fourth Circuit's ruling that the exclusion of women violated the Equal Protection Clause, VMI proposed a parallel program for women: Virginia Women's Institute for Leadership (VWIL).[67] Although VWIL proposed to share VMI's mission to produce "citizen soldiers," the

56. *Id.* at 210.
57. United States v. Virginia, 116 S. Ct. 2264, 2287 (1996)(Rehnquist, C.J., concurring).
58. J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 136 (1994)(emphasis added). *See also* United States v. Virginia, 116 S. Ct. 2264, 2286 (1996)(holding that a "substantive comparability" inquiry into a state's remedial plan for providing a separate program for women who were not allowed to attend an all-male military college as improper).
59. 511 U.S. 127, 143 (1994).
60. *Id.* at 130-31.
61. *Id.* at 136.
62. 116 S. Ct. 2264 (1996).
63. *Id.* at 2275.
64. *Id.* at 2286 (emphasis added)(quoting J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 136 (1994)).
65. *Id.* at 2271 (quoting Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982)).
66. *Id.* at 2269.
67. *Id.* at 2272.

school differed from VMI in academic offerings, methods of education, and financial resources.[68]

Justice Ginsburg, writing for the majority, reasoned that because the programs offered at VWIL were substantially inferior to those at VMI, VMI's attempt to offer a parallel education at VWIL for women failed to survive an equal protection attack.[69] The Court further reviewed the history of discrimination against women, noting that "our Nation has had a long and unfortunate history of sex discrimination."[70]

> Since *Reed*, the Court has repeatedly recognized that neither federal nor state government acts compatibly with the equal protection principle when a law or official policy denies to women, simply because they are women, full citizenship stature—equal protection to aspire, achieve, participate in and contribute to society based on their individual talents and capacities.[71]

Furthermore, the purported state interests justifying the action or legislation "must be genuine, not hypothesized or invented *post hoc* in response to litigation."[72] In no case should the legislation "rely on overbroad generalizations about the different talents, capacities, or preferences of males and females."[73]

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68. *Id.* Furthermore, "[t]he average combined SAT score of entrants at Mary Baldwin (VWIL) is about 100 points lower than the score for VMI freshmen." *Id.* Additional differences between VMI and VWIL included fewer instructors with Ph.Ds, smaller endowments, and lower faculty salaries for the VWIL program. *Id.*

69. *Id.* at 2279. Justice Ginsburg further noted that

> [a] purpose genuinely to advance an array of educational options, as the Court of Appeals recognized, is not served by VMI's historic and constant plan—a plan to afford a unique educational benefit only to males. However "liberally" this plan serves the State's sons, it makes no provision whatsoever for her daughters. That is not equal protection.

Id. (quotations omitted).

70. *Id.* at 2274-75 (quoting Frontiero v. Richardson, 411 U.S. 677, 684 (1973)). The Court documented the history of gender discrimination, noting that for

> a century plus three decades and more of that history, women did not count among voters composing "We the People" . . . . And for a half a century thereafter, it remained the prevailing doctrine that government, both federal and state, could withhold from women opportunities accorded men so long as any "basis in reason" could be conceived for the discrimination.

Id. at 2275 (citations omitted).

71. *Id. See also* Kirchberg v. Feenstra, 450 U.S. 455 (1981)(invalidating a Louisiana law that defined the husband as the "head and master" of property jointly owned with his wife and gave him unilateral right to dispose of such property without his wife's consent); Stanton v. Stanton, 421 U.S. 7 (1975)(invalidating a Utah requirement that parents support boys until age 21 and girls until age 18).

72. United States v. Virginia, 116 S. Ct. 2264, 2275 (1996).

73. *Id.*

IV. EIGHTH CIRCUIT'S APPROACH TO THE STANDARD OF SCRUTINY

Giving mandatory preference to members of one sex over members of the other, simply to eliminate the necessity to decide an issue based on the merits, is exactly the kind of arbitrary legislative choice that the Equal Protection Clause is intended to prohibit.[74] Although the vast majority of cases involving prisoners' constitutional claims have applied the heightened scrutiny analysis,[75] the Eighth Circuit never reached the issue. The court required absolutely no showing of an exceedingly persuasive justification for providing female inmates with manifestly inferior prison educational, vocational, and other programs and services.

The Eighth Circuit relied on the United States Supreme Court decision in *Turner v. Safley*[76] for the proposition that a prison regulation that impedes on inmates' rights is constitutional "if it is reasonably related to legitimate penological interests."[77] *Turner* calls for application of a lower standard of scrutiny in prisoner claims because "courts are ill-equipped to deal with the increasingly urgent problems of prison administration."[78] The Supreme Court reasoned that because courts have little knowledge of the "inordinately difficult" task of prison operation, courts should accord prison authorities a high level of deference.[79] Further, the *Turner* Court stated that permitting courts to closely scrutinize prison officials' decisions would "distort the decisionmaking process" and "seriously hamper [officials'] ability to adopt innovative solutions to the intractable problems of prison administration."[80] Thus, although the Eighth Circuit never reached the issue of the appropriate level of scrutiny, its references to the ration-

74. *See* Reed v. Reed, 404 U.S. 71, 76 (1971).

75. *See* Craig v. Boren, 429 U.S. 190, 197 (1976); Betts v. McCaughtry, No. 93-2929, 1994 WL 55562 (7th Cir. Feb. 24, 1994)(unpublished disposition); Smith v. Bingham, 914 F.2d 740 (5th Cir. 1990); Pitts v. Thornburgh, 866 F.2d 1450, 1456 (D.C. Cir. 1989); Madyun v. Franzen, 704 F.2d 954 (7th Cir. 1983); West v. Virginia Dep't of Corrections, 847 F. Supp. 402, 405-06 (W.D. Va. 1994); McCoy v. Nevada Dep't of Prisons, 776 F. Supp. 521, 523 (D. Nev. 1991)(citing City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439 (1985)); McMurry v. Phelps, 533 F. Supp. 742 (W.D. La. 1982); Canterino v. Wilson, 546 F. Supp. 174, 211 (W.D. Ky. 1982)(citing Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982)); Dawson v. Kendrick, 527 F. Supp. 1252, 1317 (S.D. W. Va. 1981); Batton v. State Gov't of N.C., 501 F. Supp. 1173 (E.D.N.C. 1980); Bukhari v. Hutto, 487 F. Supp. 1162, 1171 (E.D. Va. 1980)(citing Craig v. Boren, 429 U.S. 190, 197 (1976)); Glover v. Johnson, 478 F. Supp. 1075 (E.D. Mich. 1979); McAuliffe v. Carlson, 377 F. Supp. 896 (D. Conn. 1974); Molar v. Gates, 159 Cal. Rptr. 239 (Cal. 1979).

76. 482 U.S. 78 (1987).

77. *Id.* at 89.

78. *Id.* at 84.

79. *Id.* at 85.

80. *Id.* at 89.

ale in *Turner* indicate that it would have applied the *Turner* standard of scrutiny to the case if it had found that male and female inmates were similarly situated.

The *Turner* inquiry, however, is markedly different from the required inquiry under heightened scrutiny. The programs in *Turner* were not based on gender. Rather, the prison regulation barred correspondence between inmates at different prisons for security reasons.[81] The *Turner* analysis should be inapplicable in equal protection claims because it would nullify the scrutiny standards carefully developed by the Supreme Court. This nullification, in effect, would reduce all equal protection inquiries to a rational basis standard.[82] Given the Supreme Court's express recognition in *Turner* that the constitutional right to be treated equally with those similarly situated does not end once prisoners are incarcerated without compromising the Supreme Court's standards,[83] application of the deferential *Turner* standard to gender-based equal protection claims would be particularly inappropriate.

Nowhere in the Eighth Circuit's opinion does the court even address heightened scrutiny or the important concerns it is designed to accommodate. Instead, it superimposed a threshold standard requiring the female inmates to prove that they were similarly situated to male inmates. According to the court, only upon proof that the two classes are so situated can heightened scrutiny be applied. The Eighth Circuit panel dismissed the district court's finding that the programs at NCW were based upon stereotypical and archaic notions and were, therefore, inferior programs and services. After ignoring the district court's essential fact finding function, the appeals panel simply concluded the programs and the State's justifications for maintaining the inferior programs escaped any scrutiny in the equal protection analysis.

As will be shown in the arguments to follow, the district court, not the two judges in the majority on the Eighth Circuit *Klinger* panel, was correct in applying heightened scrutiny in the context of disparate treatment in Nebraska's women's prisons. The appropriate standard should require the court to analyze inmates' claims of sexual discrimination under the Equal Protection Clause and utilize the heightened scrutiny standard. The decisions of prison officials should not remain unrestricted at the expense of women inmates' constitutional rights.[84]

81. *Id.*

82. *See* Laddy, *supra* note 9, at 17.

83. Turner v. Safley, 482 U.S. 78, 84 (1987).

84. Laddy, *supra* note 9, at 16.

V. EIGHTH CIRCUIT'S THRESHOLD SIMILARLY SITUATED STANDARD

In *Klinger*, the district court provided five reasons for concluding that the women inmates were similarly situated to the male inmates. First, the women inmates and men inmates were both prisoners incarcerated in Nebraska institutions.[85] Second, comparing programs at the two institutions was appropriate because the DCS classified NSP and NCW inmates as "roughly comparable" with respect to custody levels.[86] Third, the penal purposes of incarceration were the same for men and women.[87] Fourth, the district court distinguished an earlier Nebraska case, *Timm v. Gunter*,[88] in which the Eighth Circuit held that the two institutions were not similarly situated for purposes of privacy rights because of different security concerns at the two institutions.[89] Finally, the court concluded that the appropriate place to account for differences between the two institutions was at the heightened scrutiny stage and *not* at the similarly situated stage.[90]

The Eighth Circuit, however, held that to present a cognizable equal protection claim, one must first prove *as a threshold matter* that he or she is similarly situated to the group receiving the allegedly favorable treatment.[91] As such, the court concluded that before the merits of the case could be discussed, it must first be determined whether the female inmates at NCW were similarly situated to the male inmates at NSP.[92] The court held that women inmates could not meet this burden, reasoning that women inmates have different characteristics altogether that prevents them from being similarly situated to male prisoners.[93] Yet, the appeals court never engaged in a discussion of how these special characteristics were relevant to the

85. Klinger v. Nebraska Dep't of Correctional Servs., 824 F. Supp. 1374, 1388-89 (D. Neb. 1993).

86. *Id.* at 1389.

87. *Id.*

88. 917 F.2d 1093, 1103 (8th Cir. 1990).

89. Klinger v. Nebraska Dep't of Correctional Servs., 824 F. Supp. 1374, 1389 (D. Neb. 1993).

90. *Id.* at 1390. The district court then proceeded to compare the programs and services at NCW with those at NSP on a program-by-program basis. It generally concluded that invidious sex discrimination existed wherever the plaintiffs received a substantially inferior program or service as compared to NSP inmates, rejecting the reasons that the defendants proffered for the difference in treatment. *Id.* at 1316. The court found that the plaintiffs suffered a "substantial burden" as to approximately 19 programs and services and that the defendants had failed to show that such differing treatment was justified under heightened scrutiny. *Id.* at 1396-452. Thus, the court concluded, the defendants violated the plaintiffs' equal protection rights. *Id.*

91. Klinger v. Department of Corrections, 31 F.3d 727, 731 (8th Cir. 1994).

92. *Id.*

93. *Id.* at 732.

DCS's decision to provide women with dramatically inferior vocational and rehabilitative programs. Instead, the court concluded that prison priorities differed because of the size of the prison and characteristics of the inmates. Based on those two distinctions, the appeals court stated that "dissimilar treatment of dissimilarly situated persons does not violate equal protection."[94]

In reaching its decision, the appeals court relied on the Supreme Court's holding in *City of Cleburne v. Cleburne Living Center*,[95] which held that the Equal Protection Clause generally requires the government to treat similarly situated people alike. The Court in *Cleburne*, however, did not create a similarly situated threshold test as part of its equal protection analysis. Instead, the Court used the phrase "similarly situated" to mean that the Equal Protection Clause requires similarly situated people be treated alike.[96] Although the term itself often appears in equal protection cases, the Supreme Court has never required that plaintiffs claiming a violation of the Equal Protection Clause prove as a threshold matter, before application of the standard of review, that they are "similarly situated" to those receiving the allegedly favorable treatment.

Although the United States Supreme Court has stated that members of different gender groups can be situated differently for constitutional purposes,[97] it is usually found in very narrow circumstances.[98] For example, in *Michael M. v. Superior Court*,[99] the Supreme Court considered whether a California statute that prohibited a male from having sexual intercourse with a minor female, but not prohibiting a female from having sexual intercourse with a minor male, violated the Equal Protection Clause. Applying heightened scrutiny, the Court first determined that California's strong interest in "the prevention of illegitimate pregnancy" was an important governmental interest.[100] Next, the Court determined "that young men and young women are not similarly situated with respect to the problems and the risks of sexual intercourse. Only women may become pregnant . . . ."[101] The Court therefore concluded that the statute's distinction between men and women was substantially related to an important governmental interest.[102]

The courts finding that men and women were not similarly situated did not end the analysis; rather, the finding merely focused it.

94. *Id.* at 731.
95. 473 U.S. 432 (1985).
96. *Id.* at 441.
97. *See* Michael M. v. Superior Court, 450 U.S. 464 (1981).
98. Rostker v. Goldberg, 453 U.S. 57 (1981).
99. 450 U.S. 464 (1981).
100. *Id.* at 470.
101. *Id.* at 471.
102. *Id.* at 473-74.

The Supreme Court has employed a similar procedure in other equal protection cases, using the similarly situated requirement to lay the foundation for the analysis of the level of scrutiny appropriate in all equal protection cases.[103] In each case, the Supreme Court has required the defendant to show that the gender-based discrimination examined in its similarly situated analysis was related to an important governmental interest.

The ultimate conclusion that two groups are not similarly situated simply cannot be made as a *threshold* matter. Such a conclusion can be reached only after discussing the applicable standard of scrutiny. The Eighth Circuit effectively switched both the inquiry and the burden of proof in equal protection cases by requiring plaintiffs to prove that they are similarly situated to their male counterparts before the court will apply the constitutionally required level of scrutiny. This approach gives prison administrators nearly unrestricted authority. According to the court's rationale, there is no longer any need to have an "exceedingly persuasive" reason, or any reason for that matter, for treating male and female inmates differently. This reasoning will subject female inmates to inferior treatment with constitutional impunity by ignoring blatant gender discrimination.[104] To begin to solve this apparent problem, the burden should be placed on the State to meet the heightened scrutiny test rather than on the plaintiffs to establish situational similarity.

In determining that women inmates were not "similarly situated" to male inmates, the appeals court considered variables that, even taken together, failed to sustain its findings. First, the court determined that NSP is larger and houses more violent criminals with longer sentences.[105] Furthermore, the court noted that women inmates have different characteristics altogether: they are more likely to be primary caregivers and to be victims of physical or sexual abuse.[106] Thus, the court concluded that prison priorities differed because of these differences in prison size and inmate characteristics.[107]

103. *See, e.g.*, Rostker v. Goldberg, 453 U.S. 57, 79 (1981)(applying heightened scrutiny to examine the constitutionality of a statute authorizing military registration of males but not females, even after holding that women and men were not similarly situated with regard to military assignments and the ability to engage in combat); Parham v. Hughes, 441 U.S. 347 (1979)(concluding that mothers and fathers of illegitimate children were not similarly situated, and then determining whether the statutory classification was rationally related to a permissible state objective).

104. Laddy, *supra* note 9, at 22.

105. Klinger v. Department of Corrections, 31 F.3d 727, 731-32 (8th Cir. 1994).

106. *Id.* at 732.

107. *Id.* ("In short, NSP and NCW are different institutions with different inmates each operating with limited resources to fulfill different specific needs. Thus, whether NCW lacks one program that NSP has proves almost nothing." (citation omitted)).

The court's analysis seems driven by its conclusion that the DCS was operating under "the restrictions of a limited budget and . . . the difference [in] institution size."[108] Such practical considerations, however, may not be used to "justify official inaction or legislative unwillingness to operate a prison system in a constitutional manner."[109]

Furthermore, financial hardship is no defense to sex discrimination in prisons.[110] In *West v. Virginia Department of Corrections*,[111] a female inmate raised an equal protection claim to the Department of Corrections challenging the vocational and educational programs in the all-female prison as compared to those at the male-only prison. In response to the defendants' argument that the differences were justified due to lack of financial resources,[112] the court held that "[i]f defendants' argument [was] carried to its logical extension, then the same argument could be used to deny women inmates the opportunity for education, vocational training or rehabilitation. Surely such an inequitable distribution of resources is not contemplated by the Fourteenth Amendment."[113]

> The differences between male and female prisoners, however, result from incarceration in very different institutions, or reflect the particular characteristics associated with female crime. The former is attributable to the classification itself, while the latter is at least partly a consequence of the different treatment of women in the criminal justice system. Because they can be traced to official discrimination, these differences cannot render men and women dissimilarly situated with respect to incarceration.[114]

In determining whether male and female inmates are similarly situated for the purpose of prison programs, courts traditionally consider variables such as custody level, sentence structure, purpose of incarceration, goals of rehabilitation, need for prison programs, function of the institutions, and inmates' capability of participating in and benefitting from a program.[115] The Eighth Circuit, however, looked instead at the characteristics of the male and female inmates, such as the probability that women were more likely than men to be abuse victims or to be single parents, while men tend to be more violent and

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108. *Id.* at 736 (McMillian, J., dissenting).
109. Bukhari v. Hutto, 487 F. Supp. 1162, 1172 (E.D. Va. 1980)(quoting Glover v. Johnson, 478 F. Supp. 1075, 1078 (E.D. Mich. 1979)). *See also* Califano v. Goldfarb, 430 U.S. 199, 217 (1977)(holding that savings in time, money, and effort do not justify gender-based discrimination).
110. Shapiro v. Thompson, 394 U.S. 618, 633 (1969)(holding that while states have a valid interest in preserving the fiscal integrity of programs, it may not accomplish such a purpose by invidious distinctions between classes of citizens).
111. 847 F. Supp. 402 (W.D. Va. 1994).
112. *Id.* at 406-07.
113. *Id.* at 407.
114. Rosemary Herbert, *Women's Prisons: An Equal Protection Evaluation*, 94 YALE L.J. 1182, 1189 (1985)(footnotes omitted).
115. Klinger v. Department of Corrections, 31 F.3d 727, 734-35 (8th Cir. 1994)(McMillian, J., dissenting).

predatory.[116] The Eighth Circuit refused to even consider the reasons why the programs and facilities at NCW are different than, and in most instances inferior to, the programs and facilities at NSP. The court justified this decision based on its determination that because "so many variables affect the mix of programming" at each institution, "comparing programs at NSP to those at NCW is like the proverbial comparison of apples to oranges."[117] This type of analysis contravenes Supreme Court precedent that establishes gender classifications reflecting gender stereotypes are unconstitutional even if there is some truth to the stereotype.[118] "In determining whether male and female inmates are similarly situated, courts should consider factors such as purposes of incarceration and need rather than cost-driven, gender proxy differences between prison populations."[119]

The Eighth Circuit further noted that a party cannot establish that female and male inmates are similarly situated by employing a program-by-program comparison.[120] The court reasoned that permitting this type of comparison to establish the requirement that groups be similarly situated would subject prison officials' decisions to close scrutiny and hamper officials' ability to adopt innovative solutions to the unique problems of prison administration.[121] This would place "the burden on prison officials to explain decisions that resulted from the complicated interplay of many variables—some of which were beyond their control—and thus are not susceptible to ready explanation."[122]

The Eighth Circuit facilitates the use of gender discrimination based on outdated views of women and impermissible generalizations. The nineteenth century movement to establish reformatories for women initiated the practice of offering women inmates inferior programs and services. The movement was based, in part, on a belief in the malleability of the female character.[123] Traditional women's roles

116. *Id.* at 733.

117. *Id.*

118. *See* J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 139 n.11 (1994). Writing for the majority, Justice O'Conner noted that

> [t]he Equal Protection Clause, as interpreted by decisions of this Court, acknowledges that a shred of truth may be contained in some stereotypes, but requires that state actors look beyond the surface before making judgments about people that are likely to stigmatize as well as to perpetuate historical patterns of discrimination.

Id. See also Laddy, *supra* note 9, at 21.

119. *See* Laddy, supra note 9, at 21 (citing Klinger v. Department of Corrections, 31 F.3d 727, 735 (8th Cir. 1994)(McMillian, J., dissenting)).

120. Klinger v. Department of Corrections, 31 F.3d 727, 732-33 (8th Cir. 1994)(McMillian, J., dissenting).

121. *Id.* at 733 (citing Turner v. Safley, 482 U.S. 78, 89 (1987).

122. *Id.*

123. CLARICE FEINMAN, WOMEN IN THE CRIMINAL JUSTICE SYSTEM 40-42, 44 (1980).

were the model for these rehabilitative efforts. To this end, the reformatories taught domestic skills and emphasized the duties to family.[124] Although these stereotypes were once used, "such classifications may not be used, as they once were, to create or perpetuate the legal, social, and economic inferiority of women."[125] Although "inherent differences" certainly exist between males and females, these differences may not be used as "denigration of the members of either sex or for artificial constraints on an individual's opportunity."[126]

These ideas and programs will continue to thrive after the Eighth Circuit reinforced such stereotypes. While certain differences between male and female inmates emphasized in *Klinger* are factual, such as the likelihood that women are more likely than men to be abuse victims and single parents, these differences only support the need for equal training and education programs.[127] Indeed, the appeals court's reasoning instructs that if a court is able to articulate *any* statistical difference between men and women—whether or not relevant to the challenged disparity—then the court need not bother analyzing the challenged disparity.[128]

VI. EIGHTH CIRCUIT'S ALTERNATE HOLDING OF PROVING INTENTIONAL DISCRIMINATION

The United States Supreme Court has long held that the constitutionality of a government classification based on gender must be determined by asking whether the classification is substantially related to an important government objective.[129] As applied, the district court correctly reasoned that the offering of educational, vocational, and recreational programs only in the men's prison, without offering

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124. *Id.* at 44-45. *See also* Herbert, *supra* note 114, at 1192.

125. United States v. Virginia, 116 S. Ct. 2264, 2276 (1996)(citation omitted).

126. *Id.*

127. The female inmates incarcerated at NCW are for the most part poor, undereducated, and lack the vocational training necessary to become self-supporting. The female inmates' gender places them at the bottom of the list of the unemployed and unemployables in this country. In other words, gender itself will disadvantage the female inmates as they attempt to enter or re-enter the workforce.

Klinger v. Department of Corrections, 31 F.3d 727, 735 (8th Cir. 1994)(McMillian, J., dissenting).

128. *See* Women Prisoners v. District of Columbia, 93 F.3d 910, 952 (D.C. Cir. 1996)(Rogers, J. dissenting). "Under the court's rationale, it would almost seem that the District could send men to a country club and women to the Black Hole of Calcutta; a difference in treatment the women received there would be ascribed to their dissimilar situation and would require no further justification." *Id.*

129. Craig v. Boren, 429 U.S. 190, 197 (1976).

equivalent programs in the women's prison, constituted a denial of benefits to female prisoners because of sex.[130]

Despite this clear standard, the Eighth Circuit determined in an alternate holding that the district court's analysis impermissibly relieved the plaintiffs of their burden of proving purposeful or intentional discrimination.[131] Furthermore, the appeals court held that the Nebraska statutes relating to prison programming were facially neutral.[132] The appeals court relied on the Supreme Court's decision in *Personnel Administrator v. Feeney*[133] to justify its departure from precedent. *Feeney* held that discriminatory intent must be proved when a classification is not overtly or covertly based on gender and when the challenge is based upon disparate "impact" rather than disparate treatment.[134] Pointing out that female inmates had not directly challenged the underlying practice of incarcerating men and women in separate facilities,[135] the court erroneously concluded the women had not challenged a "facial" gender classification. Because the women failed in this respect, they had the burden under *Feeney* of proving that their disparate treatment was the result of purposeful or intentional discrimination.[136]

The Eighth Circuit's reliance on *Feeney* is misplaced. *Feeney* applies only when the discrimination claim is based on the effects of a neutral law, not when the law or state action is facially gender-based.[137] In *Feeney*, the Court considered the constitutionality of a Massachusetts statute under the Equal Protection Clause. The statute gave veterans a distinct advantage in obtaining jobs in the Massachusetts civil service. Although the advantage applied to any veteran,

130. Klinger v. Department of Corrections, 31 F.3d 727, 739 (8th Cir. 1994)(McMillian, J., dissenting).

131. *Id.* at 733-34.

132. *Id.* at 734. The court provided the following example:

> NSP has 24-hour medical service available; two other all-male institutions and NCW lack 24-hour medical service. There is clearly no "facial gender classification" regarding 24-hour medical service where both male and female prisoners are in the group deprived of the program. Thus, determining whether the plaintiffs receive inferior programs because of their sex or for some other reason requires looking beyond the fact that female prisoners are segregated from men and examining the reasons behind the defendants' programming decisions.

Id.

133. 442 U.S. 256 (1979).

134. *Id.* at 273-74.

135. Klinger v. Department of Corrections, 31 F.3d 727, 734 (8th Cir. 1994). Instead, the plaintiffs contended that the policy of housing men and women in separate institutions had been applied in such a manner as to "relegate women to an inferior opportunity to take advantage of academic, vocational, and training opportunities." Canterino v. Wilson, 546 F. Supp. 174, 211 (W.D. Ky. 1982).

136. Klinger v. Department of Corrections, 31 F.3d 727, 734 (8th Cir. 1994).

137. Personnel Adm'r v. Feeney, 442 U.S. 256, 274 (1979).

male or female, the statute advantaged male applicants because male veterans were more numerous than female veterans. The plaintiff in *Feeney* argued that the resulting advantage disproportionately harmed women because the impact of the veterans preference law severely limited public employment opportunities for women.[138]

The *Feeney* Court acknowledged that gender-based classifications should be evaluated under the heightened scrutiny standard.[139] The Court went on to hold, however, that the essential inquiry involving facially neutral statutes is whether the adverse impact reflects intended discrimination.[140] Accordingly, the Court held that the statute did not unconstitutionally discriminate against women absent proof that the discriminatory impact on women was intentional.[141]

The *Feeney* holding instructs that when a government's action distinguishes on its face between two classes, the discriminatory intent is express and additional proof of discriminatory intent is not required. Purposeful discrimination is "the condition that offends the Constitution."[142] When a facially neutral statute or policy has a disparate impact on one particular class of people, however, the discriminatory intent is not explicit. It is necessary, in those cases only, to provide special proof that the disparate impact was the result of intentional discrimination.[143] Supreme Court cases following *Feeney* recognize this distinction.[144]

Contrary to the Eighth Circuit's opinion, the district court did not assume that any inferior program or service at NCW was the product of intentional discrimination.[145] By analyzing whether the DCS's unequal allocation of programs and services responded substantially to

138. *Id.* at 271.
139. *Id.* at 273.
140. *Id.* at 274.
141. *Id.* at 281.
142. *Id.* at 274 (quoting Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 16 (1970)).
143. *Id. See also* Marshall v. Kirkland, 602 F.2d 1282 (8th Cir. 1979). The court in *Marshall* held that "purposeful discrimination is the subject of the inquiry absent a discernable, non-neutral legislative or administrative classification subject to the important governmental interest/substantial relation test." *Id.* at 1299.
144. *See* Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982)(holding that a policy of excluding males from a single-sex nursing school violated the Equal Protection Clause without requiring further proof of intent to discriminate); Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457 (1982)(holding that a race-based nonbusing initiative violated the Equal Protection Clause without requiring proof of intent to discriminate); Kirchburg v. Feenstra, 450 U.S. 455 (1981)(holding that a statute granting to a husband exclusive control of disposition of community property was unconstitutional and violated the Equal Protection Clause without requiring proof of intentional discrimination).
145. Klinger v. Department of Corrections, 31 F.3d 727, 739 (8th Cir. 1994)(McMillian, J., dissenting). The district court's framework for analyzing the equal protection claims involved determining

an important governmental interest, the district court completed its task of determining whether or not invidious discrimination existed.[146] It is the defendant's burden to show an "exceedingly persuasive justification" for the classification.[147] Plaintiffs should be required to carry the burden of proving a facially discriminatory regulation. Nevertheless, arriving at the conclusion that the classification between the female and male inmates in Nebraska was "facially neutral," the Eighth Circuit created an artificial and unprecedented distinction between (1) facial segregation of men and women, and (2) the challenged treatment inherent in such a segregated assignment. Female inmates, "as a result of their gender alone, can receive only the programs available at NCW."[148]

Since its decision in *Reed*, which requires a higher level of analysis for gender discrimination claims, the Supreme Court has recognized that "neither federal nor state government acts compatibly with the equal protection principle when a law or official policy denies to women, simply because they are women, full citizenship stature—equal opportunity to aspire, achieve, participate in and contribute to society based on their individual talents and capacities."[149] Courts that have addressed this issue have uniformly agreed that when the consequence of gender-based segregation is gross inferiority, courts should

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> whether there are programs (means) afforded (in quantity or quality) to male inmates at NSP but not female inmates at NCW which place a "substantial burden" on female inmates (disparity); . . . if so, ascertain whether there is an important governmental objective (objective) which underlies the "means"; . . . if so, finally decide whether the "means" chosen to further the governmental "objective" are directly and substantially related to the "objective" (relationship of means to objective) such that the "disparity" may be overlooked.

Klinger v. Nebraska Dep't of Correctional Servs., 824 F. Supp. 1374, 1391 (D. Neb. 1993).

146. Klinger v. Department of Corrections, 31 F.3d 727, 739 (8th Cir. 1994)(McMillian, J., dissenting).

147. *Id.*

148. Klinger v. Nebraska Dep't of Correctional Servs., 824 F. Supp. 1374, 1388 (D. Neb. 1993). The district court further noted that

> [t]here is only one prison for women in the State of Nebraska. Whether a woman is convicted of writing bad checks or of murder, she will find herself at NCW when sentenced to prison. Men, on the other hand, could be sent to a variety of institutions depending upon a variety of penological goals—from security to programming. As a consequence, despite the fact that nongender-related reasons may exist to justify treating female prisoners differently from male prisoners, the fact remains that female prisoners, as a result of their gender alone, can receive only the programs available at NCW. Therefore, if the programming at NCW is comparatively inferior to programs at NSP, the female recipients may receive poor programming because of their gender and not for some nongender-related reason.

Id.

149. United States v. Virginia, 116 S. Ct. 2264, 2275 (1996).

apply heightened scrutiny without requiring plaintiffs to prove intentional discrimination.[150]

The Eighth Circuit's holding in *Klinger* insulates government decisions and regulations that allocate government benefits and burdens based on gender. Instead, the circuit decided to require plaintiffs to challenge, as intentional discrimination, neutral appropriation and authorization laws.

VII. CASES SINCE *KLINGER*

The courts in the Eighth Circuit continue to require plaintiffs who claim an equal protection violation to prove, as a threshold, that they are similarly situated to the party allegedly receiving favorable treatment. For example, in *Walker v. Nelson*,[151] a case decided one month after *Klinger*, the court dismissed the plaintiffs' claim after determining that they were not similarly situated to other inmates. The plaintiffs in *Walker* were inmates convicted of second degree murder. They claimed that the Governor of Nebraska and Nebraska Attorney General denied them equal protection rights by adopting a policy that denied commutation of second degree murder sentences because of parole eligibility.[152] The trial court was quick to cite the Eighth Circuit decision for the proposition that "dissimilar treatment of dissimilarly situated people does not violate equal protection."[153] Consequently, the *Walker* court held that fundamental differences existed between second degree murderers sentenced to ten years to life and first degree murderers serving life sentences in Nebraska.[154] The

150. *See, e.g.*, Batton v. North Carolina, 501 F. Supp. 1173 (E.D.N.C. 1980)(holding that where female inmates were incarcerated at an all-female institution rather than any other prison operated by the Department solely because of their gender, a facial discrimination analysis to equal protection claims is warranted where the women received inferior vocational training opportunities); Glover v. Johnson, 478 F. Supp. 1075 (E.D. Mich. 1979)(holding that where the actual consequence of a seemingly harmless classification reveals disparate treatment, there is ample justification to treat the classification and its consequence together to determine the "fit" between this end result and the governmental interest).

151. 863 F. Supp. 1059 (D. Neb. 1994).

152. *Id.* at 1061.

153. *Id.* at 1064 (quoting Klinger v. Department of Corrections, 31 F.3d 727, 731 (8th Cir. 1994)). Thus, the court also felt compelled to conclude that

> the first step in analyzing an equal protection claim is to discern whether the plaintiff has demonstrated that he was treated differently from others who were similarly situated to him. Without a threshold showing that he is similarly situated to those who allegedly receive special treatment, a plaintiff does not have a viable equal protection claim.

Id. (citation omitted). *See also* State v. Atkins, 230 Neb. 315, 320-21, 549 N.W.2d 159, 163 (1996)(holding that a provision for good time to city and county inmates on unequal basis is not a violation of equal protection because the city and county inmates are not similarly situated to state prison inmates).

154. Walker v. Nelson, 863 F. Supp. 1059, 1065 (D. Neb. 1994).

primary difference that the court felt was controlling was that inmates serving a life sentence for second degree murder are automatically eligible for parole after ten years. First degree murderers, on the other hand, are never eligible for parole unless the life sentence is commuted. Even if first degree murderers' sentences are commuted, the court reasoned that they were not similarly situated to second degree murderers because there was no evidence establishing that the first degree murderers actually served less time than the second degree murderers.[155] After concluding that the plaintiffs were not similarly situated to first degree murderers, the court's opinion ended. Nowhere did the court mention the level of scrutiny to be applied to the conduct of the state.[156]

Since *Klinger*, the Eighth Circuit has confronted equal protection claims by women inmates in two virtually identical cases. In *Pargo v. Elliott*,[157] the court affirmed a decision by the district court and dismissed the female inmates' claims. The inmates claimed that they were unconstitutionally treated in comparison with their male counterparts.[158] The claims mirrored much of the argument that the plaintiffs in *Klinger* had raised: inferior educational and vocational training, and inferior inmate privileges.[159] In addition, the inmates contended that women inmates in other security classification levels did not have the same legal assistance, work release, behavior modification classes, sex offender therapy programs, and yard and library privileges as those available to men inmates with the same classification.[160] Like the plaintiffs in *Klinger*, however, the inmates did not challenge the regulation requiring women inmates to be segregated from male inmates or claim discriminatory funding.[161] The district court, applying as a threshold matter the similarly situated analysis, held that the women inmates were not similarly situated to their male counterparts.[162] The court rejected the claim that for purposes of equal protection, "inmates are inmates," which thus satisifies the similarly situated analysis.[163] Instead, the court applied factors such as

155. *Id.*
156. The court did mention in dicta that even if the plaintiffs were similarly situated to first degree murderers, the equal protection claim would still fail because such a violation cannot be founded on "theoretical possibilities." *Id.* The court failed, however, to apply any level of scrutiny to the challenged policy.
157. 69 F.3d 280 (8th Cir. 1995), *cert. denied*, 117 S. Ct. 98 (1996).
158. *Id.* at 281.
159. *Id.* Specifically, the inmates alleged that the women are classified in a different manner, live in more confined housing, have fewer off-ground work opportunities, less library time and yard privileges, participate in different substance abuse programs, and see visitors in more restrictive settings. *Id.*
160. *Id.*
161. *Id.*
162. Pargo v. Elliott, 894 F. Supp. 1243, 1261 (S.D. Iowa 1995).
163. *Id.* at 1253.

population, average security levels, types of crimes, and average length of sentence as key factors to determine that the women inmates were not similarly situated to their male counterparts.[164] Instead of ending the analysis at that point, however, the district court proceeded with further discussion regarding the level of appropriate scrutiny.[165] The court recognized that ending the analysis after the preliminary similarly situated inquiry would be inappropriate.[166]

The problem with this approach is that instead of utilizing the heightened scrutiny analysis mandated by *Craig v. Boren*[167] and *United States v. Virginia*,[168] the court analyzed the inmates' claims under the rational basis model. The court, following the *Klinger* example, held that because the women inmates had not cited to any facially gender-based state law, general budgetary decisions, or policy choices in support of their claims, the claims could not be based on a facial classification.[169] Furthermore, the inmates failed to challenge the decision to segregate men and women inmates, or any budget allocation for the prison.[170] Although the court recognized that when a plaintiff challenges a facially discriminatory policy, the court is compelled to review the actions under a heightened scrutiny,[171] the court also recognized, relying on *Feeney*, that the inmates failed to present evidence of policies that were motivated by discriminatory intent. Thus, the plaintiffs' claim did not trigger the heightened scrutiny analysis.[172]

According to the district court in *Pargo*, the only time heightened scrutiny is warranted in a prisoner's equal protection claim is when the prisoner alleges differences in the process by which program deci-

164. *Id.* at 1254-61. After analyzing each factor, the court came to the following conclusions:

> First, the women's institution uniquely combines all security levels of inmates. Women inmates constitute a very small portion (6%) of the total prison population, so they all can be housed at a single institution. Second, women generally spend less time in prison than men because women generally are sentenced for fewer crimes, and for less serious crimes. Women often are paroled earlier than men because they are considered to be lower risk parolees. Third, characteristics common to inmates at the women's institution are different from characteristics of inmates at men's institutions. The differences among the various men's institutions and ICIW are so significant that comparisons between the two would ignore "separate sets of decisions based on entirely different circumstances."

Id. at 1261 (footnotes omitted).

165. *Id.* at 1262-65.

166. *Id.* at 1262.

167. 429 U.S. 190 (1976).

168. 116 S. Ct. 2264 (1996).

169. Pargo v. Elliot, 894 F. Supp. 1243, 1263 (S.D. Iowa 1995).

170. *Id.*

171. *Id.*

172. *Id.*

sions are made, as opposed to alleging differences in the programs between prisons.[173] Again relying on the *Klinger* precedent, the district court held that the plaintiffs had the burden of proving intentional discrimination, a burden that the plaintiffs could not meet.[174] Thus, although the court discussed the merits of the case despite the court's determination that the plaintiffs were not similarly situated to male inmates, it bypassed the crucial heightened scrutiny analysis because the plaintiffs had not challenged the segregation policy itself.

Similarly, in *Keevan v. Smith*,[175] the Eighth Circuit, with one judge dissenting, dismissed the equal protection claims brought by female inmates housed at two Missouri penal institutions. The plaintiffs contended that the Department of Corrections' policy for determining the placement of prison industry employment violated the Equal Protection Clause.[176] Affirming the *Klinger* similarly situated standard, the court held that because male and female inmates are not similarly situated, offering different prison industry employment to males and females could not violate the Equal Protection Clause.[177]

As in *Klinger*, the court alternatively held that even if the male and female inmates were similarly situated for purposes of the placement of prison industries, the allegedly unequal treatment stemmed from a facially neutral policy, and thus the plaintiffs were required to establish that the alleged disparate impact was the result of a discriminatory purpose. The court held that the plaintiffs failed to establish a discriminatory purpose because "[d]epartment officials testified that the location of prison industries was motivated not by stereotypes but by legitimate concerns such as work force stability and proximity to clientele."[178] Virtually eliminating any future claim of inferior programs and services brought by female inmates, the court further noted that "[w]hen attempts are made to compare programs offered at facilities housing inmates who are not similarly situated, 'it is hardly

173. *Id.*

174. *Id.* at 1265. In finding no evidence of invidious discrimination, the court held that all of the challenged policies were gender neutral in design and application. Moreover, the court held that there was a rational basis for the implementation of the policies. *Id.* at 1291.

175. 100 F.3d 644 (8th Cir. 1996).

176. *Id.* at 645.

177. *Id.* at 649-50. The court considered the same factors as those in *Klinger*, including prison population size, average length of stay, security classification, types of crimes, and other special characteristics. *Id.* at 648.

178. *Id.* at 651. For example, the industrial opportunities offered to female inmates were primarily that of telephone operators, data entry workers, and copying positions, which fall within the prevailing stereotypes of "women's work." *Id.* at 653 (Heaney, J., concurring in part and dissenting in part).

surprising, let alone evidence of discrimination, that the smaller correctional facility offered fewer programs than the larger one.'"[179]

In *Women Prisoners v. District of Columbia*,[180] the Circuit Court for the District of Columbia relied on both *Klinger* and *Pargo* and vacated the district court's order that required the prison officials to upgrade the work, recreational, and religious programs available to female inmates.[181] The court noted that the female inmates were not similarly situated to male inmates at a different prison.[182] The court reasoned that "the difference in the number of programs provided by prisons having vastly different numbers of inmates cannot be taken as evidence that those in small institutions that offer fewer programs have been denied equal protection. More than that is required."[183] Unfortunately, however, the court does not mention what more plaintiffs would be required to show before a court would find in the plaintiffs' favor.

Furthermore, the *Women Prisoners* court attempted to distinguish *United States v. Virginia*[184] by reasoning that while the Supreme Court focused on disparities in financial resources available to the two educational institutions, the women inmates had not alleged that the District of Columbia allocated fewer resources per female inmate.[185] Therefore, the court concluded *Virginia* was inapplicable because the inmates' claim was that the District "mismanaged the resources allocated to female inmates by failing to provide them with the identical programs offered to the men,"[186] not that the two prisons offered vastly different programs, as revealed in *Virginia*.

As in *Klinger*, the District of Columbia court's equal protection analysis in *Women Prisoners* is flawed. Rather than examine whether the government can justify its separate and unequal treatment of the sexes, the court concluded that equal protection does not even apply because the male and female inmates are not "similarly situated."[187]

179. *Id.* (quoting Women Prisoners v. District of Columbia, 93 F.3d 910, 925 (D.C. Cir. 1996)).

180. 93 F.3d 910 (D.C. Cir. 1996).

181. *Id.* at 924-26.

182. *Id.* The court quoted favorably from *Klinger* for the proposition that "dissimilar treatment of dissimilarly situated persons does not violate equal protection." *Id.* at 924 (quoting Klinger v. Department of Corrections, 31 F.3d 727, 731 (8th Cir. 1994)).

183. *Id.* at 925.

184. 116 S. Ct. 2264 (1996).

185. Women Prisoners v. District of Columbia, 93 F.3d 910, 926 (D.C. Cir. 1996).

186. *Id.*

187. *Id.* at 951 (Rogers, J., dissenting). As the dissent correctly pointed out:

> Two people commit the same crime. Each is similarly convicted by a District of Columbia court. In all respects—criminal history, family circumstances, education, drug use, favorite baseball team—they are identical. All save one, that is: they are of different sexes. Solely because of

This analysis "stands the concept of equal protection on its head"[188] by relying "on the very dissimilarity it has created to justify discrimination in the provision of benefits."[189]

VIII. CONCLUSION

The Eighth Circuit's decision in *Klinger* represents an inexcusable departure from the Supreme Court's equal protection jurisprudence. By adopting a "similarly situated" test,[190] the court uses its conclusion that men and women are treated differently to foreclose consideration of the essential constitutional question: whether that different treatment substantially advances an important governmental objective. If the equal protection inquiry ended every time a plaintiff failed to establish different treatment at a substantially similar facility, Klinger "stand[s] for the proposition that women and men prison inmates can never be similarly situated for purposes of equal protection analysis" despite the court's contrary assertion.[191]

The consequences of the decision in *Klinger* extend far beyond the specific facts of the case. First, the "similarly situated" test will allow the government to avoid application of the appropriate level of scrutiny simply by arguing that the plaintiff and the person or persons receiving the allegedly favorable treatment are not similarly situated.[192] Second, *Klinger* requires a plaintiff to prove an intent to discriminate in every equal protection claim resulting from state action that facially discriminates between men and women.[193] Consequently, the Eighth Circuit has effectively eliminated the possibility that women inmates could *ever* establish an equal protection violation.

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that difference, they are sent to different facilities at which the man enjoys superior programming options.

. . . The court relies on the different characteristics of *the facilities* to conclude that the otherwise identical men and women incarcerated therein are not similarly situated, and on that basis holds that there can be no judicial comparison of the differences in the treatment accorded to them.

Id. (Rogers, J., dissenting).

188. *Id.*
189. *Id.*
190. Klinger v. Department of Corrections, 31 F.3d 727, 731 (8th Cir. 1994).
191. Pargo v. Elliott, 49 F.3d 1355, 1356 (8th Cir. 1995).
192. *See* Laddy, *supra* note 9.
193. Klinger v. Department of Corrections, 31 F.3d 727, 733 (8th Cir. 1994).